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No. 82-1445

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE DON'T BANKRUPT WASHINGTON COMMITTEE,
APPELLANT

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, SEATTLE-FIRST NATIONAL BANK AND MORGAN GUARANTY TRUST COMPANY OF NEW YORK, AND THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF APPELLEE THE UNITED STATES OF AMERICA TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether Washington State Initiative 394, which requires a public referendum on power plant financing that the Washington Public Power Supply System has already contracted to provide, impairs the obligation of contracts in violation of Article I, Section 10, Clause 1 of the Constitution.

2. Whether appellant, a citizens' group which played a role in passage of Initiative 394, has standing to appeal when the State and its elected officials have decided to terminate the litigation.

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MOTION OF APPELLEE THE UNITED STATES OF AMERICA TO DISMISS OR AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the United States of America moves that the appeal in this case be dismissed, or alternatively, that the judgment of the Court of Appeals for the Ninth Circuit be affirmed.

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-20a) is reported at 696 F.2d 692. The opinion of the district court (partially reproduced at J.S. App. 21a-23a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1983 (J.S. App. 1a). The notice of appeal was filed on January 20, 1983 (J.S. App. 24a-25a). The jurisdictional statement was filed on February 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2). As we argue below, pages 22-27, appellant lacks standing to invoke this Court's appellate jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contract Clause of the United States Constitution, Article I, Section 10, Clause 1, and Washington State Initiative Measure No. 394, 1981 Wash. Laws (2d Ex. Sess.) ch. 6, are set forth at J.S. 2 and J.S. App. 26a-32a.

STATEMENT

Appellant, a citizens' group in the State of Washington, seeks review of the Ninth Circuit's decision that the Washington Public Power Supply System ("WPPSS") is bound by its contracts with the Bonneville Power Administration ("BPA") and others to finance and construct three nuclear power plants. The court of appeals held that Washington State Initiative Measure No. 394—which requires referendum approval of bond issues needed to complete the construction—is unconstitutional insofar as it impairs WPPSS's obligations under those contracts.

1. BPA is a federal agency charged with marketing electric power produced in the Columbia River Basin to customers in the Pacific Northwest.[1] In the early 1970's, faced with rapidly increasing demand

[1] 16 U.S.C. 832, 838; 16 U.S.C. (Supp. V) 839 *et seq.*; 42 U.S.C. (Supp. IV) 7152(a)(1)(D).

for electric power, it embarked upon a program under which some of its customers agreed to build additional power plants to meet the anticipated demand (J.S. App. 2a-3a).[2] WPPSS is a joint operating agency of the State of Washington, comprising 19 public utility districts and four municipalities. In 1971 and 1973 WPPSS contracted with BPA to build three nuclear power plants as part of the BPA program (J.S. App. 3a).[3]

The contracts ("Project Agreements")[4] obligated WPPSS to "construct the Project[s] in accordance with Prudent Utility Practice" (E.R. 199). If WPPSS and BPA disagree about whether this standard directs a halt to construction, the contracts require the issue to be resolved by a neutral project consultant (J.S. App. 4a). Neither WPPSS nor BPA has de-

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[2] Congress approved BPA's decision to arrange for additional power in this fashion in the Public Works Appropriation Acts of 1970 and 1971, Pub. L. No. 91-144, 83 Stat. 333; Pub. L. No. 91-439, 84 Stat. 899. Congress also defined these projects as part of BPA's federal base system resources under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. (Supp. V) 839 *et seq.*, to be used to meet BPA's statutory and contractual obligations to supply power. See 16 U.S.C. (Supp. V) 839a(10), 839d.

[3] Wash. Rev. Code Ann. § 43.52.360 (Supp. 1981) provides in pertinent part that two or more cities or public utility districts may form a "joint operating agency" for the purpose of "constructing, operating and owning plants * * * for the generation * * * of electric energy and power." See also *Id.* § 43.52.300(3).

[4] E.R. 192-216. References are to the contract governing Project No. 1. The contracts governing the other two projects are similar.

"E.R." refers to the Excerpts of Record filed in the court of appeals.

termined that the plants cannot be completed in accordance with prudent utility practice (E.R. 1370). WPPSS also contracted to finance the construction through issuance of revenue bonds, payable from the income derived from operation of the power plants (J.S. App. 4a).[5] The Project Agreements are thus one category of contracts that the State impaired when it passed a law forbidding WPPSS to finance construction unless it had the voters' approval via a referendum.

In resolutions accompanying the bonds that have been issued ("bond resolutions") WPPSS covenanted with the bondholders that it would "proceed with all reasonable diligence to * * * complete * * * construction at the earliest practical time" (E.R. 978).[6] It also promised to issue additional bonds "to the extent required to enable the System to pay the remaining balance of the Cost of Construction" (*id.* at 937). The resolutions recognize that performance of the covenant to complete and operate the projects is "essential to the payment and security of the Bonds" (*id.* at 994). The bond resolutions are thus a second category of contracts that the State impaired when it passed Initiative 394. Since the bonds involved are revenue bonds, failure to complete the projects would jeopardize the stream of revenues that the bondholders counted on to secure their investment.

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[5] When it entered the Project Agreements WPPSS's board of directors was statutorily authorized to issue revenue bonds to finance the construction of energy projects "[w]henever the board * * * shall deem it advisable" to do so. Wash. Rev. Code Ann. § 43.52.3411 (1970).

[6] Under Washington law, the bond resolutions are contracts between WPPSS and the bondholders. Wash. Rev. Code Ann. § 54.24.110 (1962).

WPPSS and the other project "participants"[7] assigned their shares of the plants' future output to BPA. BPA in turn assumed their obligation to pay the principal and interest on the revenue bonds (and other costs) whether or not the projects are completed (J.S. App. 4a-5a).[8] These agreements ("Net Billing Agreements"), like the Project Agreements, require WPPSS to construct the plants unless "Prudent Utility Practice" should direct otherwise (J.S. App. 4a). The Net Billing Agreements are the third category of contracts impaired by Initiative 394.

Construction began at the three plants in 1972, 1975, and 1977 (E.R. 101, 103, 105), and by mid-1982 the three projects were approximately 89%, 63%, and 52% complete (E.R. 102, 103, 105). At that time, approximately $6.1 billion in revenue bonds had been issued to finance construction, and it was estimated that $2.8 billion more would be necessary to complete the three projects (E.R. 112-114).[9] Two

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[7] WPPSS sold part of each project's generating capability to other "preference customers" of BPA (i.e., public bodies and cooperatives, who are entitled to priority in BPA's sales of electricity). These project "participants" then assumed liability for an equivalent percentage of the project cost. For example, the City of Seattle got 7.992% of the capacity of Project 2, and undertook to pay 7.992% of its cost (Exh. 6). "Exh." refers to exhibits introduced in the district court.

[8] BPA is entitled to 100% of the output of two plants, and 70% of the third (J.S. App. 5a n.5). The sum of the yearly payments Bonneville would have to make on the outstanding bonds through the year 2018 is approximately $20 billion (Exh. 28).

[9] The court of appeals stated that in May 1981 the estimated total cost of the three plants was $12 billion (J.S. App. 6a n.8). The additional $3.1 billion is attributable to interest paid, or to be paid, during construction by BPA under the

of the projects are scheduled to be completed in 1984 and 1986 (E.R. 102, 105). There have been significant cost overruns and delays in the construction of the plants,[10] but as we noted above, none of the parties has sought termination of the projects under the contractual standard ("Prudent Utility Practice").

2. Initiative 394 was passed in November, 1981. It applies to future "[m]ajor public energy project[s]," including those under construction if costs have exceeded the original estimates by more than 200% (J.S. App. 26a-27a). The Initiative provides that "[n]o public agency [of the State of Washington] * * * may issue or sell bonds to finance the cost of construction * * * of a major public energy project, or any portion thereof, unless it has first obtained authority * * * at an election conducted in the manner provided in this chapter" (J.S. App. 28a). The Initiative requires voter approval "[b]ecause the construction of major public energy projects will significantly increase utility rates for all citizens" (J.S. App. 26a). Since the statute applies only to "[m]ajor public energy project[s]"—i.e., plants capable of generating more than 250 megawatts (*id.* at 26a-27a)—it affects only the three nuclear power plants at issue in this lawsuit (plus two other nuclear plants not involving BPA).

Net Billing Agreements, and to the cost attributable to investor-owned utilities' 30% ownership share of Project 3 (E.R. 875-876). See note 8, *supra*. The parties to the contracts have agreed to delay further construction of one of the plants—Project 1 (E.R. 1514).

[10] This has been true for most nuclear plants, which have faced five-fold increases from 1967 to 1974 primarily because of inflation and regulatory requirements (Exh. 69, at 1-3; see also Exh. 83, at 1-4).

3. The trustees for the holders of bonds already issued by WPPSS,[11] and the United States of America on behalf of BPA, brought these consolidated actions against the State of Washington challenging the validity of Initiative 394. They argued that the voter approval requirement for issuance of the bonds necessary to finish the plants impaired the obligation of WPPSS's contracts with the bondholders (the bond resolutions) and BPA (the Project Agreements and the Net Billing Agreements). The United States also argued that in any event federal law—including the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. (Supp. V) 839 *et seq.*—preempted the Washington Initiative. The Don't Bankrupt Washington Committee, which had sponsored Initiative 394 on the 1981 ballot, intervened in support of the State.

The facts were largely stipulated by the parties (E.R. 90-117) and the relevant contracts were submitted to the district court. The district court held that Initiative 394 unconstitutionally impaired WPPSS's existing contractual obligations to finance and complete the three partially-constructed nuclear power plants (E.R. 159-180; J.S. App. 21a-23a).

4. The Ninth Circuit affirmed (J.S. App. 1a-20a). Applying settled law enunciated by this Court in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), and *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), the court of appeals held that WPPSS had contracted, without material reservation, to use its best efforts to finance and construct the three plants (J.S. App. 10a-14a). It also found that Initiative 394, by requiring voter approval of the fi-

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[11] Continental Illinois National Bank and Trust Company of Chicago, Morgan Guaranty Trust Company of New York, and Seattle-First National Bank.

nancing needed to complete the plants, substantially impaired the obligation of these contracts (J.S. App. 14a-16a). It held that this impairment was not justified as a reasonable or necessary exercise of the State's financial or economic powers (J.S. App. 16a-20a).

ARGUMENT

I. APPELLANT'S ARGUMENTS AGAINST APPLICATION OF THE CONTRACT CLAUSE ARE WITHOUT MERIT

Settled Contract Clause principles reaffirmed by this Court in *United States Trust Co.* v. *New Jersey*, *supra*, and in *Allied Structural Steel Co.* v. *Spannaus*, *supra*, make clear that Initiative 394 worked an impairment of contract that was both substantial and unjustified. As the court of appeals noted, "the promise of completion was the only consideration BPA received for agreeing to pay the construction and financing costs" of the three power plants (J.S. App. 11a). Similarly, investors in the revenue bonds expected, if nothing else, that WPPSS would complete the projects whose revenues were to be the return on their investment. There is little justification for claiming either a reserved right to renege on those promises, or a public purpose to excuse their performance.

A. WPPSS Has No Expressly Reserved Right To Walk Away From Its Contracts

Appellant first argues that no impairment of contract occurred because the State and WPPSS expressly reserved the right " 'to change their minds' " about the obligation to finance and construct the three power plants (J.S. 11-16, quoting L. Tribe, *American Constitutional Law* 470 (1978)). In support of this argument appellant cites section 5(a) of WPPSS's Project Agreements with BPA. That provision states

that WPPSS will use its best efforts to issue and sell bonds to finance construction, "*provided* * * * that in each such case such Bonds may then be legally issued and sold" (E.R. 201). Appellant also cites a statutory provision (Wash. Rev. Code Ann. § 43.52.3411 (1970)) subjecting WPPSS, like other state public utility districts, to all relevant present and future conditions governing the issuance of revenue bonds (J.S. 12-13).

Requiring that the promised bonds be "legally issued," as section 5(a) does, is obviously different from authorizing the passage of laws to inhibit the issuance of bonds. Like the requirements in § 43.52.3411, section 5(a) assures "compliance with regular and broadly applicable bonding requirements of the state for the issuance of bonds" (J.S. App. 10a). Section 5(a) plainly contemplates, for example, that "[t]he resolution authorizing the issuance of the bonds shall fix the rate or rates of interest * * * and the place and date of the payment of both principal and interest." See Wash. Rev. Code Ann. § 54.24.018 (Supp. 1982). But the only benefit BPA contracted for—in return for assuming an obligation to pay $20 billion in principal and interest (see note 8, *supra*)—was completion of the plants. "WPPSS's ability to issue additional bonds [to finance completion] was accordingly the centerpiece of the entire arrangement" (J.S. App. 11a). To suppose that the contract left WPPSS free to renege on that obligation " 'is an absurdity.' " *United States Trust Co.* v. *New Jersey*, *supra*, 431 U.S. at 25 n.23, quoting *Murray* v. *Charleston*, 96 U.S. 432, 445 (1877).[12] Passage of

[12] One who contracts to construct a building for the state in accordance with "lawful" building code specifications hardly agrees that, half way through the job, the state can hold a referendum and walk away from the contract.

a law such as Initiative 394 was a possibility far beyond the "reasonable expectations" of WPPSS and BPA when they signed the Project Agreements. *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, No. 81-1370 (Jan. 24, 1983), slip op. 15.

Nor does the existence of § 43.52.3411 afford any additional justification for impairment of the Project Agreements or bond resolutions. That section provides that WPPSS bonds are subject, for example, to "all the provisions of law as now or hereafter in effect relating to * * * interest rate[s]", but it surely does not mean that the State can lower the rate for bonds already issued (J.S. App. 13a). For the same reason it does not authorize the State to forestall the issuance of bonds promised to BPA (in return for its contractual undertakings) and to existing bondholders (to assure "the payment and security of the[ir] Bonds") (E.R. 994). The legislature's evident purpose, in subjecting WPPSS bonds to "all the provisions of law as now *or hereafter* in effect relating to revenue bonds * * * of public utility districts", was simply to avoid the need to amend chapter 43.52 every time it amended the chapter dealing with public utility district revenue bonds. It is perverse to read into those terms the authority to prevent issuance of bonds already contracted for, when the very same section states that WPPSS "shall have power to issue revenue bonds * * * [w]henever the board * * * shall deem it advisable * * *." § 43.52.3411.

Appellant errs in suggesting that the language in section 5(a) of the Project Agreements—which fails in any event to support its claim—should be strictly construed against BPA (J.S. App. 15-16). It is

doubtful, in the first place, that this Court has adopted such a rule of construction. See *Owensboro* v. *Cumberland Telephone Co.*, 230 U.S. 58, 74 (1913) (when "the right * * * *to destroy* a contract * * * is claimed, it must be clear and explicit") (emphasis added). Cases like *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), offer little support for appellant's suggestion, involving as they do "public grants" "in [the] nature of monopolies" (*id.* at 545-546) rather than obligations incurred by the government in return for enormous financial benefit. In any event the principle advanced, if it derives from concern for the public interest, would be out of place where the constituency served by a public agency like BPA is, if anything, broader than that protected by the reservation.

B. The State Has No Reserved Power To Submit Existing Contractual Obligations To Voter Approval

Appellant also argues that—regardless of their explicit terms—WPPSS's contracts with BPA and the bondholders are subject to certain sovereign powers that cannot be covenanted away (J.S. 16-18). Among these, appellant claims, is the state's sovereign authority to "*alter the structure of governance of its political subdivisions*" (J.S. 16)—in this case, to determine "*who shall decide*" whether WPPSS may issue future bonds (J.S. 17).

This contention is frivolous. It ignores the fact that the State, through WPPSS, has *already* decided to finance these three plants to completion. The State is entirely free to alter the powers of operating agencies like WPPSS. What it may not do is abrogate contracts already undertaken by such agencies through

the simple expedient of resubmitting them for voter approval.[13]

In any event, as this Court has noted, "the scope of the State's reserved power depends on the nature of the contractual relationship with which the challenged law conflicts. * * * * * When a State impairs the obligation of its own contract," claims of reserved power are scrutinized more carefully. *United States Trust Co.* v. *New Jersey, supra*, 431 U.S. at 21-23. Financial undertakings that have proved more burdensome than expected cannot be avoided by arguing that a state reserves "the future exercise of the taxing and spending powers" (*id.* at 24). To the extent that Initiative 394 is designed to limit public spending (J.S. App. 18a), appellant's argument is simply that "completion of the projects as contracted by WPPSS ha[s] become too expensive" (*ibid.*).

C. Initiative 394 Substantially Impairs WPPSS's Contractual Obligations

Appellant next argues that even if Initiative 394 was not authorized by express or implied reservation, it is consistent with the Contract Clause because it does not substantially impair the contracts WPPSS had with BPA and the bondholders (J.S. 18-21). This is so, it urges, because the Initiative is not a "but for" cause of any financial harm to BPA and the bondholders, and because it was a response to unanticipated events—and thus upset no "legitimate expectations of the parties" (*id.* at 19).

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[13] To say that Initiative 394 falls within the essential attributes of sovereignty simply because it requires a referendum is to invoke a principle without limits. Any contract that a state later deems improvident could be put to a vote, with predictable results. See also *Shapleigh* v. *San Angelo*, 167 U.S. 646, 657 (1897).

It is obvious that the Initiative has caused financial harm to BPA and the bondholders. As the court of appeals pointed out (J.S. App. 14a-15a):

> The issuance of additional bonds by WPPSS is essential to the performance of its contracts; it is particularly crucial to the obligation running from WPPSS to BPA. * * * Bonds necessary for completion of the projects can only be issued after approval of the proposed expenditure of the proceeds by the electorate at a popular referendum. No standard can be imposed on the electorate in exercising its decision, nor can it be subjected to any review. It can reject the proposal for any reason or no reason.

In short, whether BPA gets (from the completed projects) any power in return for its agreement to pay $20 billion in principal and interest has been turned over to the unreviewable discretion of the voters. It is of course possible, as appellant suggests (J.S. 28), that the voters will approve the necessary financing. It is also possible that the result would be favorable if it had been made to turn on the flip of a coin. But the State cannot require the federal government to play roulette by claiming that no harm occurs until the game is played out. As a legal matter, impairment occurs when the state passes a law repudiating a contractual obligation, not when the repudiation causes financial loss to a party. *United States Trust Co.* v. *New Jersey, supra* (bondholders need not wait until state fails to pay principal or interest).

Even if the projects were not terminated by referendum, the Initiative creates an obvious threat of construction delay. We are informed that WPPSS currently estimates it has funds to continue construction on Projects 2 and 3 until May of this year (cf. C.R.

143, at 22).[14] If WPPSS is unable to issue bonds after that date, construction will be delayed. During such a delay it could cost up to $5 million per month to maintain one of the projects (C.R. 140, at 109, 135). Moreover, there would be direct costs as high as $250 million associated with stopping and resuming construction on a project (C.R. 143, at 28). When coupled with increases due to additional interest and cost escalation, the cost of a one-year delay followed by a resumption of construction could be as high as $650 million per project (E.R. 1367; C.R. 140, at 109-110).

The referendum requirement impairs the rights of the bondholders as well as BPA. BPA remains obligated to insure payment of the bonds, but the bondholders can no longer be confident of revenues that were to be paid to WPPSS in return for power from the plants. This impairment of their security has had, as the district court found (J.S. App. 21a-22a), the predictable result of reducing the value of their bonds on the secondary market. It has also provoked leading evaluating services such as Moody's Investor Service and Merrill Lynch to downgrade the bonds (Exh. 48; E.R. 1425). Their claim of substantial impairment is even more compelling than the one this Court found sufficient in *United States Trust Co.* v. *New Jersey*, *supra*, 431 U.S. at 19.

Appellant's argument that Initiative 394 works no substantial impairment because it responds to an unexpected problem is also without merit. As the court of

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[14] "C.R." refers to the Clerk's Record in the district court. WPPSS can stretch out work on Project 3 by a few months if it continues to operate on a four-day work week. It is also possible that BPA, with congressional approval, could finance completion of Project 2 out of its operating revenues, though that is of course not what the parties contracted for.

appeals noted (J.S. App. 4a), the contracting parties *did* foresee the possibility that completion of the plants in light of changed circumstances might be contrary to "Prudent Utility Practice." They accordingly included an express contractual standard to deal with that possibility, and a process for resolving disagreements between BPA and WPPSS about whether termination was warranted in light of "Prudent Utility Practice" (E.R. 198-199, 212). Initiative 394 simply ignores the contractual standard and substitutes a different process for dealing with changed circumstances, in an evident effort to authorize termination where the Project Agreements forbid it.

The case is thus different from *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, *supra*, in two ways. First, the Court there found it "highly unlikely" that the parties had anticipated the deregulation of gas prices by the Natural Gas Policy Act of 1978, 15 U.S.C. (Supp. V) 3301 *et seq.* Rather, "the contracts were structured against the background of regulated gas prices." Slip op. 14. The Kansas Natural Gas Price Protection Act thus did not upset the parties' expected procedure for price determination, but responded to a contingency the contract had not provided for. Second, and perhaps more important, the Court emphasized that "[i]f deregulation had not occurred, the contracts undoubtedly would have called for a much smaller price increase than that provided by the Kansas Act[]" (*ibid.*). The party complaining of state impairment was in fact deprived of nothing more than windfall profits from unexpected deregulation. Cf. *City of El Paso* v. *Simmons*, 379 U.S. 497, 515 (1965). Here, by contrast, Initiative 394 could deprive BPA of the only benefit it contracted for—completion of the projects—under circumstances that do not meet the contractual standard for termination.

D. The Substantial Impairment Caused By Initiative 394 Cannot Be Excused As Reasonable And Necessary

Appellant's final argument under the Contract Clause is that even if Initiative 394 causes a substantial impairment of the rights created by contract, the law is nonetheless constitutional because it is "*reasonable and necessary to serve an important public purpose*" (J.S. 21, quoting *United States Trust Co.* v. *New Jersey, supra*, 431 U.S. at 25). Appellant also asserts that great deference is due the State's justification for the Initiative because the contracts impaired are not its own, but those of a municipal corporation (J.S. 21-22).

The latter proposition is specious. This Court has recognized no such distinction between municipal and state contracts. *United States Trust Co.* v. *New Jersey, supra*, for example, noted (431 U.S. at 24):

> the Court has regularly held that the States are bound by their debt contracts.[22]

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[22] State laws authorizing the impairment of municipal bond contracts have been held unconstitutional. *W.B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56 (1935); *Louisiana* v. *Pilsbury*, 105 U.S. 278 (1882). Similarly, a tax on municipal bonds was held unconstitutional because its effect was to reduce the contractual rate of interest. *Murray* v. *Charleston*, 96 U.S. 432, 443-446 (1878).

The Court relied upon the same authorities in *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co., supra*, in saying (slip op. 11 n.14): "In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets." See also Schulz, *The Effect of the Contract Clause and the Fourteenth Amendment Upon the Power of the States to Control Municipal Corpora-*

tions, 36 Mich. L. Rev. 385, 401-408 (1938). The similarity in treatment should not be surprising, since states can act only through agents of one form or another, and a municipal corporation is "a mere agent of the State * * *." *New Orleans* v. *New Orleans Water Works Co.*, 142 U.S. 79, 91 (1891).

Indeed, *United States Trust Co.* v. *New Jersey* itself involved a statutory provision that impaired the security of bonds issued by the Port Authority, not by the state. Though it is true that the covenant impaired was adopted by statute (431 U.S. at 9-10), the role of the State in the consummation of these contracts is no less significant. WPPSS, as a "joint operating agency," is a creature of a state law. Wash. Rev. Code Ann. § 43.52.360 (Supp. 1981). The state legislature has specifically empowered it to construct power plants like those at issue here (*ibid.*), and to issue revenue bonds to finance construction (*id.* § 43.52.3411). In fact, the State specifically authorized WPPSS to construct these three projects by executing site certification agreements with WPPSS.[15] Whether the state acts directly or through an "operating agency," the case is different from contracts between private parties for the simple reason that future contingencies affecting the public interest can be taken into account at the bargaining stage. Note, *A Process-Oriented Approach to the Contract Clause*, 89 Yale L. J. 1623, 1647 & n.115 (1980). Subsequent claims that impairment is "reasonable" and "neces-

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[15] WPPSS obtained the site certification agreements pursuant to Wash. Rev. Code Ann. ch. 80.50 (Supp. 1981). The Code specifies that such agreements "bind the state and each of its * * * political subdivisions * * * as to the approval of the site and the construction and operation of the proposed energy facility." *Id.* § 80.50.120.

sary" are therefore more suspect. Moreover, the claim of the party dealing with the government that he is entitled to rely on its promises is more compelling. Public commitments are, in short, governed by "a simple constitutional principle: *government must keep its word.*" L. Tribe, *American Constitutional Law* 470 (1978).

Measured by the appropriately non-deferential standard, *United States Trust Co.* v. *New Jersey*, *supra*, 431 U.S. at 26, appellant's claim that Initiative 394 is "reasonable and necessary" must fail.[16] An impairment of contract is not reasonable when it is drawn with "an extremely narrow focus," rather than to address a broad social concern. *Allied Structural Steel Co.* v. *Spannaus*, *supra*, 438 U.S. at 248. But as the court of appeals recognized, "[t]he Initiative [is] * * * narrowly targeted to modify th[e]se very contracts, rather than being part of a broad public program with incidental impairing effects" (J.S. App. 18a-19a). Because the law applies only to 250 megawatt plants (*id.* at 26a-27a), its *only* effect is on five plants that were to be built by WPPSS—the three contracted for with BPA, and two others that have been terminated (*id.* at 6a & n.7). Moreover, the

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[16] Not only has appellant failed to show that the Initiative is a "reasonable and necessary" modification of these contracts; it is also doubtful that that standard can be applied to the federal government. The power to make "reasonable and necessary" modifications to contracts derives from the "continuing and dominant protective power" of the state to promote the greater public welfare by regulating private contract rights. *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 437 (1934). But under the Supremacy Clause (Art. VI, § 2) the state has no power to advance its citizens' welfare at the expense of the even larger public served by the federal government.

financing costs assumed by BPA would ultimately be passed on to ratepayers not just in the state of Washington, but throughout the Pacific Northwest (E.R. 98, 1355-1370). The decision to terminate the projects, on the other hand, and to give those ratepayers nothing for the costs they will have to bear, is left by the Initiative with voters in the political subdivisions that make up WPPSS.

Nor is it even possible to maintain, as appellant does (J.S. 23-24), that these objectionable features are a response to circumstances unforeseen when the contracts were signed. Cf. *United States Trust Co.* v. *New Jersey*, *supra*, 431 U.S. at 31-32. To keep the matter in perspective, it should be noted that the Pacific Northwest has had and "will continue to enjoy electricity prices which * * * are significantly lower than the national average" (E.R. 1513). It is true that there have been cost increases and delays in the construction of these plants. But as pointed out above, pages 6 note 10, 14-15, those concerns were known when these contracts were signed, and the Project Agreements included provisions for termination of construction whenever that step was dictated by "Prudent Utility Practice." Even if the problems encountered have been more severe than anticipated, the change has been "of degree and not of kind." *United States Trust Co.* v. *New Jersey*, *supra*, 431 U.S. at 32. It does not justify the substantial impairment effected by Initiative 394.

Not only is the Initiative unreasonable; it is also not the only way to deal with the problems of cost, delay, and mismanagement appellant complains of. As this Court stressed in *United States Trust Co.* v. *New Jersey*, *supra*, 431 U.S. at 30-31, "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives.

Similarly, a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well."

Appellant advances three objectives purportedly served by the Initiative. One is "to provide a mechanism for citizen review and approval of proposed financing for major public energy projects" (J.S. 26). But that is simply another way of saying that financing already agreed to by contract should be reconsidered in a referendum. It is true that a referendum is the only way to accomplish "citizen review," but as we noted above, note 13, that tactic could be employed to excuse impairment of any contract the state might sign. The issue is really whether there are other ways of controlling cost, delay, and mismanagement. One obvious method is to exercise the control the voters already had over WPPSS's management. See Wash. Rev. Code Ann. §§ 43.52.370, 54.12.010 (Supp. 1981) (election of board of directors). Other possibilities were offered by the State Senate Energy and Utilities Committee (E.R. 1329-1335), on whose Inquiry appellant relies so heavily (J.S. 5, 23). It is noteworthy that the Committee did not suggest adoption of the Initiative as a way of accomplishing its goals,[17] and the State legislature specifically declined to adopt such a measure (E.R. 1396-1407).

A second objective advanced by appellant is nothing more than a variation on the first: "to 'require WPPSS to live within stated budgets' " (J.S. 27). Though appellant speaks of this as a "*process* goal," not a "substantive goal" (*id.* at 28), it once again

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[17] Several of the Committee's suggestions have in fact been adopted by the State. 1982 Wash. Laws (1st Ex. Sess.) ch. 43, § 3 (creation of an executive board with outside members); 1982 Wash. Laws (1st Ex. Sess.) ch. 44 (amendment to competitive bidding requirements).

means simply that future financing WPPSS has contracted to provide cannot be provided unless the voters approve it.

Appellant's third objective is "to 'require' that WPPSS consider cost-effectiveness criteria in making future financing decisions" (J.S. 27). But Initiative 394 in no way ties voter approval or rejection of further financing to a project's cost-effectiveness. In any event, as the court of appeals correctly noted, that matter is no longer an issue, since "WPPSS has already undertaken to obtain cost effectiveness studies for the three projects" (*id.* at 17a n.13).[18]

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[18] There is no merit to appellant's contention that the court of appeals' decision should be summarily reversed because it overlooked the district court's alleged violation of Fed. R. Civ. P. 52 (J.S. 28-30). The case was submitted largely on stipulated facts and exhibits. See E.R. 90-118, 176-178. The district court explicitly adopted as findings the 105 paragraphs of stipulated facts contained in the amended pretrial order (E.R. 173). When the district court made oral findings on the disputed issues, counsel for the State represented to the court that the State and the appellant found them satisfactory (E.R. 176-178):

> THE COURT: * * * I will consider entering written findings of fact if the parties request it, or do you think I have covered it in my oral decision?
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> * * * * *
>
> MR. GOLTZ: Your Honor, I think Mr. Heineman and I agree that the oral decision of the Court is fine, and it certainly saves everyone else a lot of time.
>
> THE COURT: * * * I will then consider what I have said in my oral decision as the findings of fact and conclusions of law in the case. If you do not think so, if you do not think it is sufficient upon which to base an appeal if one is forthcoming, then I would request that you assist me in doing so.
>
> MR. GOLITZ: Your Honor, as I said, the defendants agree that your oral decision would be fine with us.

Because the questions raised by appellant are so clearly unsubstantial as not to need further argument, the decision of the court of appeals should be affirmed summarily.

II. APPELLANT LACKS STANDING TO APPEAL

This appeal has been filed by a self-proclaimed "citizens' group that drafted and campaigned for Initiative 394" (J.S. 3). The State of Washington itself, its Governor, Attorney General, and Secretary of State—against whom this action was brought by the United States and the trustees for the bondholders, and who alone are subject to the district court's injunctive order—have decided not to appeal. That decision is the result of an agreement reached between the State and WPPSS on February 11, 1983 ("Agreement").[19] The State concluded, after the court of appeals' decision, that it was "in the * * * interests of the State, its citizens, and the Washington Public Power Supply System" to terminate this litigation (Agreement 1). Accordingly it "promise[d] and agree[d] *not to seek review* by the United States Supreme Court" of the Ninth Circuit's decision (*id.* at 4; emphasis in original).[20] The Agreement was signed by the State Attorney General, who is charged under state law with the obligation to "[d]efend all actions * * * against any state officer or employee acting in his official capacity, in any of the courts of

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[19] Copies of the Agreement have been lodged with this Court and furnished to counsel for appellant.

[20] WPPSS undertook to file with the Secretary of State its "substantially completed" cost-effectiveness studies for Projects 2 and 3, and to do similar studies for Projects 1 (now postponed), 4 and 5 (now terminated) if and when they should be revived (Agreement 2-3).

this state or the United States * * *." Wash. Rev. Code Ann. § 43.10.030 (Supp. 1981); see also *id.* § 43.10.040. As the State's courts have recognized, the Attorney General is vested with discretion to consider both practical litigational difficulties and the likelihood of benefit to the State from pursuit of judicial redress. *Berge* v. *Gorton*, 88 Wash. 2d 756, 567 P.2d 187 (1977); *Boe* v. *Gorton*, 88 Wash. 2d 773, 567 P.2d 197 (1977).

Appellant was not a defendant in the suits brought by the United States and the banks. It intervened in the district court claiming that "its unique * * * role in helping to secure passage of Initiative 394 * * * satisfie[d] the requirements for intervention of right," "or at least permissive intervention, pursuant to Fed. R. Civ. P. 24 (Memorandum Of The Don't Bankrupt Washington Committee In Support Of Motion To Intervene As A Defendant at 6, 18).[21] However correct the district court's decision to permit intervention, there is a difference between participation in a live controversy between the plaintiffs and the State, and carrying the action forward alone after the State has decided it should be terminated.[22] In the former case,

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[21] The district court's order does not state whether appellant was allowed to intervene permissively or of right. Copies of the Memorandum In Support Of Intervention and the court's order have been lodged with this Court.

[22] Cf. *Director, OWCP* v. *Perini North River Assocs.*, No. 81-897 (Jan. 11, 1983), slip op. 4-8; *Princeton University* v. *Schmid*, 455 U.S. 100, 102-103 (1982). In *Perini North River Assocs., supra*, the injured employee was actually before this Court as a nominal respondent urging reversal. In this case, by contrast, appellant has acknowledged that the State and its officials "have no interest in the outcome of this appeal" and has so informed the Clerk pursuant to Rule 10.4 of the Rules of this Court. A copy of the letter is included an an addendum to the Motion to Dismiss or Affirm (A-8 to A-9) filed by

both Article III and prudential requirements are satisfied by the controversy between the original parties. In the latter situation the intervenor must demonstrate that it has an appealable interest, i.e., that it independently satisfies the traditional standing requirements.[23] In this case it is clear that appellant does not.

Continental Illinois National Bank and Trust Company of Chicago.

[23] See *Boston Tow Boat Co.* v. *United States*, 321 U.S. 632 (1944); *Barry* v. *District of Columbia Board of Elections*, 580 F.2d 695, 697-698 (D.C. Cir. 1978); *United States* v. *Imperial Irrigation District*, 559 F.2d 509, 521 (9th Cir. 1977), rev'd in part and vacated in part *sub nom. Bryant* v. *Yellen*, 447 U.S. 352 (1980); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 753-754 (1968).

In *United States* v. *Imperial Irrigation District*, *supra*, the Ninth Circuit permitted a group of intervenors to appeal in an action brought by the government, after the government had decided not to appeal. This Court upheld the intervenors' standing to appeal. *Bryant* v. *Yellen*, *supra*, 447 U.S. at 365-368. The Court noted explicitly that the intervenors' "interest is not 'shared in substantially equal measure by all or a large class of citizens,' * * * because [they] are residents of the Imperial Valley who desire to purchase the excess land for purposes of farming." 447 U.S. at 367 n.17. In this case, by contrast, appellant's interest in defending Initiative 394 is not in any sense individual, "since 394 is aimed at benefiting all the citizens of the State" (J.S. 24). In the former case the uniqueness of the intervenors' claim may undermine the usual presumption that the government adequately represents them. See 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1909, at 530-531 (1972). In this case, by contrast, it is indisputable that the party "best suited to assert [the] claim" raised by appellant is the State itself. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979). The very purpose of the prudential rules of standing is to "limit access to the federal courts" to parties of that description (*ibid.*).

The simplest way of measuring appellant's interest against traditional standing requirements is to suppose that the State, rather than acquiescing in a declaration that its law was unconstitutional, had taken the comparable step of repealing the law. See Wash. Const. Amend. 26. In that case it would be evident that appellant had no basis for seeking to override the decision that elected representatives had made on behalf of all the people of the State.[24] The same is true here. This is not a case where a private party asserts a superior federal right that overrides state officials' decision to enforce [25] or not to enforce [26] state law. Nor is it a case where the state official charged with enforcement of state law does not do so, and the party alleging standing is able to assert an independent state statutory right to litigate on its own.[27] Indeed, it is not even a case where a private party has asserted (by way of mandamus, for example) that state officials have neglected a duty imposed on them by state law in failing to perform their enforcement or other functions.[28] Unlike the private parties in those cases, appellant has no substantive principle to use as a fulcrum for overturning the court of ap-

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[24] *Utility Contractors Ass'n* v. *Toops*, 507 F.2d 83, 86 (3d Cir. 1974) ("had any of the municipalities chosen voluntarily to change its building code, the appellants' monetary interests would not have conferred legal standing to prevent such governmental action").

[25] See *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Roe* v. *Wade*, 410 U.S. 113, 124 (1973).

[26] Cf. *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973).

[27] Wash. Rev. Code Ann. §§ 19.86.080, 19.86.090 (1978) (Consumer Protection Act).

[28] See *Boe* v. *Gorton, supra; State ex rel. Lemon* v. *Langlie*, 45 Wash. 2d 82, 273 P.2d 464 (1954). Cf. *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

peals' decision, except a state law which the State itself has now chosen to abandon.[29] The State's elected representatives—having vigorously defended the constitutionality of Initiative 394 and lost on two occasions, "having considered all matters relating to the availability of review by the United States Supreme Court" "and the consequences to the citizens of the state by continuing this litigation"—"have concluded that it is in the mutual interests of the State, its citizens, and the Washington Public Power Supply System" to drop its defense of the Initiative (Agreement 1, 4).

It may be conceded that Initiative 394 was passed to promote interests like those appellant asserts. But where the State has litigated the validity of its law and decided to acquiesce in a holding that it is unconstitutional, it is not the prerogative of private citizens to revive the law through further litigation, even if they might benefit in an abstract way by doing so. The doctrine of standing focuses above all "on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968). Because standing rules "limit access to the federal courts to those litigants best suited to assert a particular claim[,] * * * a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class

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[29] As this Court noted in *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975), "standing * * * often turns on the nature and source of the claim asserted. * * * [T]he source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes."

of citizens.'" *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979), quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).[30] In the latter case the proper representatives of the citizenry are the state itself and its elected officials. If factions within the public are unhappy, "our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them." *United States* v. *Richardson*, 418 U.S. 166, 179 (1974).

Because appellant lacks standing to appeal, the appeal should be dismissed for lack of jurisdiction.

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[30] There can be no doubt that appellant's asserted interests fit the latter description. Appellant may have worked harder than other groups to assure passage of the Initiative, but it did not thereby acquire a greater interest in the referendum process set up by the law. Appellant also suggested to the district court that utility ratepayers contributed money to the Committee, though it did not assert that, as a nonprofit corporation, it has members who are ratepayers. (Affidavit of Steve Zemke 3, 7. We have lodged with the Court a copy of this affidavit, introduced in the district court in support of appellant's motion to intervene.) Moreover, the 19 public utility districts and four municipalities that make up WPPSS cover the better part of the state (E.R. 1363A-1363B), and any claim that rates may be affected if the Initiative is struck down would be "'shared in substantially equal measure by * * * a large class of citizens.'" *Gladstone, Realtors* v. *Village of Bellwood*, *supra*, 441 U.S. at 100, quoting *Warth* v. *Seldin*, *supra*, 422 U.S. at 499. In any event, as the Motion of Appellee Continental National Bank and Trust Company of Chicago to Dismiss or Affirm (at 14-17) demonstrates, appellant's claim of economic harm is too conjectural to serve as a basis for standing.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the alternative, the judgment of the court of appeals should be summarily affirmed.

Respectfully submitted.

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Solicitor General

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